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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF SAN LUIS OBISPO,

Plaintiff and Respondent,

v.

WAYNE A. HANSON et al.,

Defendants and Appellants.

2d Civil No. B211412
(Super. Ct. No. CV050169)
(San Luis Obispo County)

Property owners Wayne A. Hanson and Mary Jane Lynch Hanson, individually and as co-trustees under a deed of trust dated January 6, 1982, for the benefit of the Wayne and Mary Jane Hanson Trust (Hanson), Kevin Thornton, Michael Kidd, Rose Garden Inn, and Western Inns (business owners) appeal from a judgment determining the City of San Luis Obispo's (City) right to take part of their property by eminent domain and fixing the amount of compensation to be paid as \$141,012 for the part taken and \$87,280 for damage to the remainder (severance damages).

Appellants object to the right to take on the ground that (A) the taking was triggered by Costco's private needs, rather than public necessity, (B) the City did not make the pre-condemnation offer required by statute, and (C) the City grossly abused its discretion by irrevocably committing itself to the taking before the hearing on the resolution of necessity.

Appellants also challenge the compensation award on the grounds that (A) the severance award should have been larger, (B) the court should have allowed evidence of lost goodwill, and (C) the court should not have excluded evidence that Costco was advancing the costs of acquisition and should not have instructed the jury that compensation would be paid by the "public." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant property owners own a parcel of land in San Luis Obispo on which appellant business owners operate the Rose Garden Inn. The Inn faces Highway 101. A frontage road, Calle Joaquin South, ran in front of the Inn, between the Inn and the Highway. It was realigned to run behind the Inn as part of the project that gave rise to this action.

In its original location, Calle Joaquin South overlapped with the southbound on-ramp to Highway 101 near the Inn at the Los Osos Valley Road (LOVR) interchange, creating confusion, congestion and collisions.

For 20 years, the City looked for a solution. In 1983, the City and Caltrans designated funds to study alternative solutions for the LOVR Interchange. In April of 2003, the City presented seven alternative LOVR interchange projects to the community in a workshop. Some of the alternatives contemplated realignment of Calle Joaquin South. After the workshop, Hanson sent a letter to the City expressing concerns about eminent domain.

By August of 2003, the city council had pared the interchange project alternatives down to three. It directed staff to pursue one of these as the preferred alternative. Under the preferred alternative, Calle Joaquin South would be realigned to run behind the Inn, intersecting the unimproved tip of its property, and would then rejoin Calle Joaquin North, away from the LOVR interchange. The City directed staff to pursue this alternative in phases. The first phase, relocation of Calle Joaquin South, was expected to be completed quickly because it was entirely within the City's jurisdiction and would not require Caltrans oversight. In August of 2003, City staff estimated that the rough cost of all phases of the interchange project would be \$16,000,000. It

contemplated "private development contributions and . . . outside funding grants" to defray costs.

Meanwhile, Costco Wholesale Corporation sought permission to build a warehouse store in the area. The City determined that the Costco project would impact traffic at the LOVR interchange significantly. The final Environmental Impact Report (EIR) for the Costco project stated, "The project will cause the level of service at the [LOVR interchange] to deteriorate from acceptable levels to unacceptable levels."

On November 4, 2003, the City approved the Costco project. As a condition of approval, the City required Costco to realign Calle Joaquin, subject to the approval of the Director of Public Works. This condition was included as a mitigation measure in the final EIR.

To satisfy the realignment condition, Costco would need to acquire rights of way from several property owners, including appellants. According to the Deputy Director of Public Works, the City knew that Costco might not be able to obtain all of the necessary rights of way through private negotiations. He testified that in that event, the matter would be returned to city council to decide whether to assist with the acquisitions using its power of eminent domain, or to do something else about the realignment of Calle Joaquin.

The City established a sub-area traffic impact fee (TIF) program to assess costs of the interchange improvements upon projects that would develop on the benefitted properties. Costco's use permit required it to pay its share of TIF before it could get a building permit. Costco was required by separate agreement to advance all costs of real property acquisition, including the City's legal costs in the event of eminent domain proceedings, with later reimbursement from TIF money for costs in excess of Costco's assessed share.

Starting in 2003, the City and Costco had informal discussions with appellants about the realignment project. In May and July of 2004, City representatives met with Hanson and the business owners to discuss the realignment. In about July of 2004, a law firm acting on behalf of the City and Costco retained a land acquisition

specialist, Lillian Jewell, to try to privately negotiate the acquisition between Costco and affected property owners. The same specialist was later employed by the City to conduct pre-condemnation negotiations.

In September of 2004, Costco offered to purchase the appraised property interests for \$186,000 and gave Hanson two weeks to respond. The offer was based on the opinion of appraiser Warren Reeder, retained by Costco, who determined that the value of the unimproved tip of appellants' property, and necessary construction and slope easements, was \$186,000. (Gov. Code, § 7267.2.) Reeder determined that the remainder of the property would suffer no severance damage as a result of the taking or construction. Hanson did not accept Costco's offer. The City and Costco had agreed that if Costco was unable to acquire the property by October 1, the City would take over and try to acquire it themselves through negotiations or, if necessary, through condemnation.

Pre-Condensation Offer

On October 19, 2004, the city council reviewed and approved Reeder's appraisal in a closed session and authorized staff to begin negotiations. It directed staff to make a pre-condemnation offer to appellants for \$186,000. The City did not retain a separate appraiser. The Deputy Director of Public Works signed Reeder's appraisal as "[a]pproved for [a]cquisition" by the City. On October 22, 2004, the City sent its pre-condemnation offer to appellants through its representative, Jewell. Hanson testified that he requested, but never received, the full appraisal report. He felt the offer was inadequate because it did not include severance damages. He argued that, as a result of the realignment of Calle Joaquin, the front of the hotel would become the rear, requiring relocation of the reception building. Realignment would destroy the bucolic nature of the formerly rear-facing rooms. Hansons' attorney wrote to the City objecting to the appraised value. Appellant property owners did not make a counter offer.

On November 16, 2004, the City amended the Costco EIR to allow Costco to open its store before realigning Calle Joaquin. City staff reported that realignment was delayed by the "[n]eed to acquire [a] right-of-way from a landowner to complete improvement," among other reasons, and stated that a "separate item, which deals with a

Resolution of Necessity" would be brought before the city council at a later date. As a condition of amending the EIR, the City required Costco to post a bond of \$1,930,000 for the realignment project and required Costco to complete the realignment within two years after obtaining the necessary permits.

Resolution of Necessity

The City gave Hanson and others notice of a November 2004, hearing on a resolution of necessity. The resolution would be to acquire, for public roadway purposes, property that included the undeveloped rear tip of the Inn property, and slope easements and temporary construction easements along the rear and south-side edges of the remainder of the Inn property. At appellants' request, the hearing was rescheduled to December 7, 2004. Only two members of the public spoke at the hearing. One was counsel for appellants, who objected to the appraisal process. The other was a representative of a property owner who did not object to acquisition. After discussing the merits, the city council voted unanimously to adopt the resolution.

Eminent Domain Action

In February 2005, the City commenced this action to acquire the property by eminent domain. In April of 2005, the court granted the City possession prior to entry of judgment upon deposit of \$186,000. (Code Civ. Proc., § 1255.410.)¹ The newly realigned Calle Joaquin South roadway was opened to the public in the spring of 2006.

Trial on Right to Take

In April 2007, the court conducted a five-day bench trial on appellants' objections to the right to take. (§ 1260.110.) The Deputy Director of Public Works testified on behalf of the City. Appellants presented the testimony of Hanson, the tenant business owners, the Director of Public Works, and Costco's attorney. The court overruled appellants' objections to the right to take. The court found that the City complied with the pre-condemnation and offer requirements of Government Code section 7267.2 and that it did not engage in any gross abuse of discretion.

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

The court stayed the jury trial on just compensation to allow appellants to petition this court for review of the right to take decision by writ of mandate. On June 20, 2007, we denied the petition. (*Hanson v. San Luis Obispo Superior Court* (B199468, rev. den. S153983 [2007].) In January 2008, the City made a final offer of \$400,000 to appellants pursuant to section 1250.410. Appellants did not accept.

Trial on Just Compensation

In April 2008, the jury trial on just compensation began. After hearing testimony of appellants' appraiser, the court determined that appellants were not entitled to compensation for lost goodwill and precluded them from presenting their goodwill claim to the jury. The court also granted the City's motion in limine to exclude reference to Costco and agreed to instruct the jury pursuant to BAJI 11.71 that the term "just compensation" means "just to the owner and also to the public which must pay the compensation."

The parties' experts agreed that the value of the part taken was about \$140,000, but they gave conflicting opinions on the severance damage to the remainder. Appellants' appraiser, Bruce Beaudoin, estimated that the fair value of severance damages was \$1,159,000, assuming a remainder "before" value of \$4,029,000 and an "after" value of \$2,870,000, based on the income capitalization approach. The cost to cure would be \$858,000, which would pay to reorient the Inn to make it attractive from the new road, add a new reception building and two driveways, add about \$87,000 in new landscaping, and compensate for the lost value of eight potential rooms that could no longer be developed because of lost potential parking area. In his opinion, the best approach was the income capitalization approach. His lost income figures relied on the fact that income had been reduced in the months after the realigned road was opened, but disregarded the fact that income had subsequently increased during the most recent three months. His reorientation figure was based on an architect's plan and included about \$260,000 for new functioning balconies and patios on the formerly rear-facing and Southside-facing rooms, and \$37,000 for two new driveways. When the architect testified, he conceded that the Inn was a budget hotel in its before condition.

The City's expert opined that there would be no meaningful difference in the value of the remainder before and after the taking, and that the Inn's income fluctuated too much to use the income approach to determine before and after values. He testified that any severance damage could be cured for \$73,600 by providing new signs, a monument, a driveway, a new garbage collection area, and new parking. The figure included a \$4,285 offset for the benefit of new parking he believed would exist where the former Calle Joaquin South had been abandoned. Later testimony established that appellants had declined the City's offer to abandon the old road, and had asked the City to continue to maintain it as public dead-end road.

Several days before trial, the City had agreed to pay to construct the new driveways for up to \$37,000 in response to engineered plans that appellants submitted. The City's witnesses testified, over appellants' objection, that the City's plan now included the driveways. There was conflicting testimony whether appellants had previously asked the City to construct driveway access and whether the City had previously agreed to construct a driveway, but it was clear that appellants had not provided engineered plans for their proposed driveways until two weeks before trial.

The jury awarded \$141,012 for the part taken, and \$87,280 for severance damage. The trial court entered judgment on the verdict and also ordered, pursuant to stipulation, that the City pay up to \$50,000 for the construction of the two driveways. The court also awarded appellants' their statutory costs pursuant to section 1268.710.

DISCUSSION

I.

The Right to Take

Appellants contend that there was no public necessity for the taking because it was triggered by Costco's private needs, not public necessity; the City did not make the offer required by Government Code section 7627.2; and the resolution of necessity was the product of gross abuse of discretion because the City pre-committed to the taking. Substantial evidence supports the trial court's findings to the contrary.

The government may take property through eminent domain only for a public use. (U.S. Const., 5th & 14th Amends; Cal. Const., art. I, § 19.) The exercise of the power of eminent domain requires a finding of public necessity. (§ 1240.030.) There are three essential elements to the public necessity finding: (1) public interest and necessity require the project, (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, and (3) the property sought to be acquired is necessary for the project. (§ 1240.030.)

A local entity must hold a hearing on these criteria before it may acquire a property by eminent domain. (§ 1245.235.) The property owner must be given notice of the hearing and an opportunity to be heard. (*Ibid.*) If the agency finds that the criteria are met, it will adopt a resolution of necessity. The resolution of necessity is a prerequisite to condemnation. (§§ 1240.040, 1245.220.) The resolution must also state that the offer required by section 7267.2 has been made or that the owner could not be located. (§ 1245.230.) The agency must "engage in a good faith and judicious consideration of the pros and cons of the issue" and "the decision to take [must] be buttressed by substantial evidence of the existence of the three basic requirements." (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1125.)

Once adopted, the resolution of necessity conclusively establishes the three basic criteria. (§ 1245.250, subd. (a).) However, the resolution does not have conclusive effect if its adoption or contents were influenced by a gross abuse of discretion. (§ 1245.255, subd. (b).)

A person with interest in the property may obtain limited judicial review, either by writ of mandate before the eminent domain action is commenced, or by objection to the right to take in the eminent domain action. (§ 1245.255.) The adoption of a resolution of necessity is a legislative act. Our review is narrowly circumscribed. (*City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1221.) The trial court reviews the agency's decision for gross abuse of discretion. Its review is limited to the agency's proceedings; it may not retrace the legislative body's analytic route. (*Ibid.*) On appeal,

our inquiry is confined to the question of whether the findings and judgment of the trial court are supported by substantial evidence. (*Ibid.*)

A. Public Necessity

The Legislature has declared that condemnation of private property for a public roadway is a public use. (§ 1240.010, Gov. Code, § 40404.) Substantial evidence of pre-existing problems at the LOVR interchange supported the determination that a public roadway purpose required this taking. "Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose." (*Redevelopment Agency v. Hayes* (1954) 122 Cal.App.2d 777, 803.) Moreover, "lawful eminent domain proceedings are not rendered invalid because private persons who will be specially benefited by the improvement pay, or agree to pay, the cost thereof in whole or in part." (*City of Carlsbad v. Wight* (1963) 221 Cal.App.2d 756, 760.)

There was substantial evidence that the City identified a need to realign Calle Joaquin 20 years before it approved the Costco project. In 1983, the City conducted an initial study and environmental assessment for revision of the interchange in conjunction with the California Department of Transportation and the Federal Highway Administration. The study included a 20-year projection that showed the southern part of Calle Joaquin (Calle Joaquin South) no longer connected to the southbound on-ramp. In 1991, the City authorized requests for proposals from consultants. In 2001, the City retained a consultant to prepare alternatives for the interchange project. The public need for a solution was not negated by the City's inability to fund the solution until it secured development contributions from Costco in 2003.

B. Pre-Condemnation Appraisal and Offer

Substantial evidence supports the court's express finding that the City made the offer required by section 7267.2 of the Government Code. Appellants contend that the City's pre-condemnation offer did not comply with the requirements of section 7267.2 because the City used Costco's appraisal; the City impermissibly negotiated before the

property was appraised; the City did not give appellants an opportunity to accompany the appraiser on his site inspection; and the City did not provide a detailed written statement of the basis for the appraised value. Amici curiae argue that a condemner may not satisfy its duty to appraise the property by adopting a third party's appraisal, and that the practice undermines confidence in the condemnation process statewide.

The power of eminent domain may only be exercised by one with statutory authority. (§ 1240.020; *City of Sierra Madre v. Superior Court* (1961) 191 Cal.App.2d 587, 590 [a city successful prevented a corporation from prosecuting a condemnation action in the city's name without its authority].) Before adopting a resolution of necessity and initiating negotiations to acquire the property, the public entity must (1) "establish the amount that it believes to be just compensation," and (2) make an offer to the owner for that full amount. (Gov. Code, § 7267.2, subd. (a)(1).) The offer must be based on "the public entity's approved appraisal of the fair market value of the property." (*Ibid.*) The requirements of section 7267.2 are mandatory. (*City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1011.)

The statute does not expressly require the public entity to hire its own appraiser. Government Code section 7267.2 requires only that the appraisal be "approved" by the public entity. Section 7260 defines an "appraisal" for purposes sections 7260 through 7277 as being "independent[] and impartial[]." (Gov. Code, § 7260, subd. (k).) Here, the city council reviewed and approved Reeder's appraisal. Reeder was hired by Costco, but was not its employee. He was a certified and licensed real estate appraiser. He testified that he acted as "an independent appraiser" and that his opinion would have been the same whether he was hired by Costco or the City. Substantial evidence supported the trial court's finding that Reeder was independent and impartial.

Substantial evidence also supported the finding that the City provided a sufficient statement of the basis or the appraised value. The City was not required to furnish the full appraisal upon which the offer was based. (Gov. Code, § 7267.2, subd. (c).) It was required to furnish a written summary of the basis for determination of the

value as required by section 7267.2, subdivision (b).) The statement must "contain[ed] detail sufficient to indicate clearly the basis for the offer, including, but not limited to, all of the following information: . . . (1) The date of valuation, highest and best use, and applicable zoning of property. [¶] (2) The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the determination of value. [¶] (3) If appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated and shall include the calculations and narrative explanation supporting the compensation, including any offsetting benefits." (§ 7267.2, subd. (b).)

The City's letter offer of October 22 satisfied these requirements. It included an appraisal summary statement derived from Reeder's formal appraisal. The summary included the date of valuation ("September 7, 2004"); highest best use ("Continued hotel use"); zoning ("CT"); the principle transactions supporting the determination of value (four comparable sales); a separate statement of the just compensation for property acquired (\$186,000) and of damage to the remainder (\$0); and the calculations and narrative explanation supporting the \$186,000 value. There was no narrative explanation supporting the zero value for damage to the remainder, but the statute only requires the explanation "if appropriate." (§ 7267.2, subd. (b)(3).) As Reeder explained in the right to take trial, he determined that severance damages were not appropriate because the former interchange was dangerous, "[t]he road realignment to the rear of the property provided a very improved intersection and the Rose Garden Inn still had its front on the freeway and it would have access to the rear as a result of a new road."

As amici curiae point out, the detail required for the written statement is the same as that required by California Code of Regulations, title 25, section 6182 and Code of Civil Procedure sections 1255.010 and 1255.030. Title 25, section 6182 require

additional specific recitals. (*Id.*, subds. (d) - (f))² These recitals were included in the City's offer. Section 6182 also requires the City to make "reasonable efforts" to discuss its offer with the owner, to give the owner a reasonable opportunity to present information he believes to be relevant to value, to "carefully consider" that information, and not to take any coercive or misleading action to compel agreement on price. (*Id.*, subd. (i).) Whether these regulations are discretionary or mandatory, substantial evidence in the record supports a conclusion that the City complied with them. There was testimony that the City made reasonable efforts to discuss the offer with Hanson in November through Jewell, the City's governmental real estate services agent, and there was testimony and correspondence indicating that the City carefully considered the material submitted by Hanson's counsel that was relevant to value. Substantial evidence supports the trial court's express finding that the City did not take any coercive or misleading action to obtain agreement on price.

The summary appraisal in this case is more complete than the single page that was provided to the owner in *City of San Jose v. Great Oaks Water Co.*, *supra*, 192 Cal.App.3d 1005. In *Great Oaks*, substantial evidence supported the trial court's conclusion that the condemner did not comply with Government Code section 7267.2 when it gave the owner a summary appraisal statement, with no written summary of the basis for determination of the value, five days before it adopted the resolution of necessity. (*Id.* at pp. 1009, 1011, 1014.) The condemnee had no prior notice that acquisition was contemplated and had been misled in that regard. The condemner offered \$2,000 for property that included valuable rights to provide utility service and a structure that cost \$8,000 to build. The summary report contained "absolutely no" written statement of the basis for the value, and there was "nothing in the record" to support the assertion that a written summary was otherwise provided to the condemnee. (*Id.* at p. 1014.)

² Sections 1255.010 and 1255.030 contain the same requirements as section 7267.2 of the Government Code.

Substantial evidence supported a conclusion that the real property was appraised "before the initiation of negotiations," and the owner was "given an opportunity to accompany the appraiser during his or her inspection of the property." (Gov. Code, § 7267.1.) The City did meet with Hanson and the Rose Garden's business owners before the property was appraised, but those meetings did not constitute negotiations. Although appellants gave conflicting testimony about whether Costco offered a land swap, the testimony of Hanson, the operators of the Inn and the City's representatives were consistent that no money was offered by the City, or Costco, in those meetings and no monetary demands were made. Thus, Hanson had an opportunity to accompany the appraiser before negotiations began. Hanson testified that he was not given an opportunity to accompany Reeder until after Reeder prepared his September 9 appraisal, but Reeder testified that in a telephone call on September 14 he told Hanson that they could meet at the property together with "more lead time" and that he did not hear from Mr. Hanson again. The City made its first offer in late October. Reeder reappraised the property on December 6, 2004, before the December 7 hearing on the resolution of necessity triggered negotiations.

C. Pre-Commitment

A gross abuse of discretion may be shown by a lack of substantial evidence to support the resolution of necessity, or by showing that, at the time of the hearing, the condemner had irrevocably committed itself to the taking of the property regardless of the evidence presented. (*Santa Cruz Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 149.) Appellants contend that the resolution of necessity was the product of gross abuse of discretion because the City irrevocably committed to the taking when it amended Costco's EIR to allow construction of the store before realignment was complete. They argue that without the taking, Costco could not comply with the EIR or contain the traffic impact to a level that would be consistent with the City's general plan.

Substantial evidence supports the trial court's determination that there was no pre-commitment. The hearing on the resolution of necessity reflects a judicious consideration of the pros and cons of the issue; it was not a sham in which the agency

rubber-stamped a predetermined result. Appellants had been included in public discussions about the interchange project, alternatives, and acquisition for at least three years before the hearing. At the hearing, appellants' attorney was the only member of the public to speak against the resolution, and his objections were focused only on the appraisal process. He did not question the need for the taking. The comments of council members reflect careful consideration of the public necessity and the private injury compared to the public good. The acquisition was part of the least intrusive realignment alternative. One member asked why realignment would hurt the Inn's business when "[we] will still have a 'freeway' facing hotel and the frontage road will circle around and then bring you into the 'front' of the hotel." Appellants' counsel responded that "we are "not" here . . . to talk about value." He explained only that the owners thought that the reception area facing the freeway "is not going to be fronting upon the new access road," and that "they know more than you do, I suspect."

The Deputy Director of Public Works reported his belief, and the belief of CalTrans, that realignment of Calle Joaquin would improve the existing traffic problems at the LOVR interchange. He pointed to the city council's last two financial plans which established the LOVR interchange improvements as a major goal. He noted that realignment of Calle Joaquin was an element of the final two alternatives under final consideration for CalTans approval, that other alternatives had been eliminated during the public workshop process, and that the proposed configuration took advantage of vacant areas and wound around private property, avoiding improvements.

The comments of council members reflected concern with safety, not concern with Costco's EIR compliance. Councilmember Ewan stated that "this is a project that with or without the Costco is desperately needed on Los Osos Valley Road. The situation out there has been unsafe there for a long time." Councilmember Mulholland said, "You all know that I am not a proponent of the Costco, but I have to agree . . . that whether or not Costco is in the picture, LOVR overpass is a major city goal, has been for years. And we have to realign Calle Joaquin, it's one of the early steps to do this" Councilmember Brown commented that he was "very sympathetic to the

Rose Garden Inn's view point that they are taking the front of the hotel and putting it in the back, but I agree . . . that this realignment is necessary" The Mayor remarked that acquisition would require compensation to the Inn but, "we are dealing with a long needed improvement to this interchange. The state does not have and will not have the money to do it and we don't have the money to do it, but we need to start. And this is the first step. We have someone to help us for the first time. So even though this is connected with one of the development projects, this is a needed city project"

This hearing was not like the sham proceeding that supported a finding of gross abuse of discretion in *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121. In that case, the owner of a restaurant was "misled, if not deceived," about plans for his property. (*Id.* at p. 1127.) He did not know that the City planned to acquire most of his restaurant's parking lot. By the time of the hearing on the resolution of necessity, the agency had entered into a contract to convey the parking lot to a developer for condominium construction and had issued and sold bonds to fund the acquisition. The hearing was a sham, affected by "prior elimination of any discretion whatsoever." (*Ibid.*)

Here, the City approved the Costco construction before the resolution of necessity, but that approval did not constitute irrevocable pre-commitment to the taking. The City retained discretion to disapprove the resolution and could have modified the realignment condition if it became infeasible. Under the California Environmental Quality Act (Pub. Resources Code, § 21000 et al.), projects may proceed without adopting mitigation measures identified in the EIR if the measures are found infeasible and public benefit outweighs impacts. (*Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 291-292.) A mitigation measure may be changed or deleted if it is found to be impractical or unworkable. (*Lincoln Place Tenants Ass'n. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508-1509 [upholding deletion of a traffic mitigation measure where there were no funds and the project was only a minor contributing factor to the problem].)

Moreover, the public need for the acquisition did not come as a surprise to appellants, who were involved in the public debate about the interchange and realignment for years before the hearing. In that respect, appellants' position is similar to the position of the property owner in *City of Saratoga v. Hinz*, *supra*, 115 Cal.App.4th 1202, who resisted acquisition of a roadway easement over his residential property and "had years of prior notice that an easement would be required." (*Id.* at 1226.) In *Hinz*, there was no pre-commitment to the taking even though the county had formed a special assessment district to pay for the acquisition and roadway before the hearing on the resolution of necessity, because the agency retained discretion to decide against the acquisition. If a majority of members of the assessment district had objected to the project it would not have gone forward. The record disclosed meaningful discussion of the public interest and necessity and a debate on the merits, and most of the members of the assessment district supported the project. (*Id.* at pp. 1226-1227.) Here, too, the record reflects meaningful discussion and debate. No one joined in appellants' opposition. The fact that the vote was unanimous does not establish that it was predetermined.

II.

Just Compensation

The government may take private property for public use only when just compensation is paid. (Cal. Const., art. I, § 19.) "[J]ust compensation consists in no more and no less than making the landowner whole for the loss sustained as a result of the taking." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 704.) As far as practicable, the trier of fact separately assesses (1) compensation for the property taken, (2) any injury to the remainder ("severance damage"), and (3) any loss of goodwill. (§ 1260.230.) The property owner presents compensation evidence first, but neither party has the burden of proof on the amount of compensation. (§ 1260.210.) For goodwill damages, the property owner does bear the burden of proof on the preconditions to entitlement, but neither party has the burden with respect to the amount. (§ 1263.501, subd. (a); *People ex rel. Dept. of Transportation v. Salami* (1991) 2 Cal.App.4th 37, 45.)

A. Severance Damages

Appellants contend that the severance award should be modified upward from 87,280 to \$1,159,000, the value calculated by their expert, because the City's appraiser employed improper methodology and assumed untrue facts and because the trial judge should have excluded evidence of the City's offer to pay for driveways. We disagree.

When property taken is part of a larger parcel, the owner must be compensated for the injury, if any, to the remaining land. (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 745.) These "severance damages" consist "generally of the diminution in the fair market value of the remainder property caused by the project," reduced by any benefit from the project. (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*, *supra*, 16 Cal.4th at p. 712, §§ 1263.410-1263.430.) The property owner may not recover for lost business resulting from traffic rerouting. (*Leonard v. People ex rel. Dept. of Transportation* (1998) 62 Cal.App.4th 1296, 1300, [lost business resulting from closure of freeway off-ramp adjacent to owners' property was non-compensable].) The purpose of severance damages is to make the property owner whole. The owner is to be paid the damage actually suffered, and nothing more. (*Los Angeles County Metropolitan Transportation Authority*, at p. 715.)

We reject appellants' contention that the opinion of the City's appraiser was inadmissible because he used "cost to cure" as a stand-alone approach to valuation. Severance damages are "normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego v. Neumann*, *supra*, 6 Cal.4th at p. 745.) Severance damages may be based on any factor resulting from the project that causes a decline in the fair market value. (*Los Angeles County Metropolitan Authority v. Continental Development Corp.*, *supra*, 16 Cal.4th at p. 712.) The cost of replacement or restoration of improvements may be considered in determining severance damages. (*People v. Hayward Bldg. Materials Co.* (1963) 213 Cal.App.2d 457, 465.) A

condemner is entitled to adopt the criterion of damage which produces the smaller result and may use cost to cure defensively. (*Id.* at p. 466.)

The City's appraiser was not required to formally determine the fair market value of the remainder before and after the taking. He testified that such an analysis would be a waste of time because there would be no difference between the before and after values: the Inn was no more attractive from the front in its before condition than it was from the rear, the Inn would continue to have highway exposure, and the City would provide driveway access to the new road. His use of the cost to cure approach was not improper because a condemner may use cost to cure defensively. "'When the owner relies upon evidence of a decrease in market value of the property as it is left by the taking, the condemner may show the cost of restoring the property to its former relative position.'" (*People v. Hayward, supra*, 213 Cal.App.2d at 466.)

Appellants' contention to the contrary is not supported by *Olson v. County of Shasta* (1970) 5 Cal.App.3d 336, 343. *Olson* was an inverse condemnation case in which the property owners were not permitted to rely solely on cost to cure evidence because they had no evidence of any actual injury to their property caused by government activity. The lack of injury was fatal to their claims, and the trial court properly directed a verdict against them which would have required the county to construct a drainage system on adjacent property to prevent possible flooding in the future. The "cost to cure" of an offsite drainage system could not supply the missing proof of any injury to their property. The court noted that, in both inverse condemnation and eminent domain proceedings, the "cost of replacement or restoration of improvements ('cost to cure') may be relevant evidence on the issue of damages [citation], [but] it is not a measure of damages to be separately assessed without reference to the loss in fair market value of the property taken or damaged." (*Id.* at p. 342.) Here, appellant property owners offered evidence of the loss in fair market value of damaged property, and the City properly offered evidence of the lower cost to cure value in response.

The assumptions of the City appraiser did not render his opinion inadmissible. He properly relied upon evidence that the City would provide driveways,

as discussed below, and his incorrect assumption that part of Calle Joaquin had been abandoned went to the weight of his opinion, not its admissibility.

A condemning agency may agree to do work on the owner's property to reduce compensable damage. (§ 1263.610.) City representatives testified that they agreed to build two driveways on the remainder, exactly as proposed by appellants' architect and engineer. The driveways would partially overlap the slope easements that are described in the resolution of necessity. Appellants contend that this overlap impermissibly contradicted the resolution of necessity. A public entity may not introduce evidence which purports to limit the taking by contradicting the resolution of necessity (*County of San Diego v. Bressi* (1986) 184 Cal.App.3d 112, 123), but the driveway agreement did not contradict the resolution of necessity. Appellants retained the right to use the condemned slope easements in any way that did not conflict with the City's slope use. Substantial evidence supports a conclusion that the driveways would not interfere with the City's slope use, and thus did not contradict the resolution of necessity.

B. Goodwill

Appellants contend that the trial court erred when it excluded their expert's opinion on lost goodwill. We conclude that the trial court properly excluded Beaudoin's goodwill opinion.

Goodwill is "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage." (§ 1263.510, subd. (b).) The right to recover goodwill in an eminent domain action is purely statutory and the burden of proof of entitlement is on the business owner. The trial court decides the question of entitlement. Only if the business owner proves four preconditions to entitlement to the satisfaction of the court may the question of the amount of compensation for lost goodwill go to the jury. (*Emeryville Redevelopment v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1119.) The four preconditions are: (1) the loss is caused by the taking or by injury to the remainder; (2) the loss cannot be reasonably prevented by relocation of the business or by taking reasonably prudent steps to preserve the goodwill;

(3) the loss will not be covered by business relocation payments; and (4) the loss is not duplicated by other compensation awarded. (§ 1263.510, subd. (a).) The trial court must also function as a gatekeeper, excluding expert testimony that is not reasonably reliable. (Evid. Code, § 801.) "[W]hile there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of actual value." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1523.) We review for abuse of discretion a trial court's decision not to present the question of the amount of goodwill compensation to the jury. (*City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 395 [experts' goodwill testimony properly excluded where expert did not measure value of pre-taking goodwill and compare it with post-taking goodwill].)

The trial court did not abuse its discretion when it concluded that the expert's goodwill value was an arbitrary percentage of lost income that was already included in his severance damage calculation. The \$207,000 Beaudoin attributed to lost goodwill was an element of his severance damage, making it an unauthorized duplicate claim. (§ 1263.510, subd. (a).) Beaudoin testified that his severance value of \$1,159,000 included \$850,000 to reorient the hotel, \$45,000 in reduced rooms to be developed, \$57,000 for loss of the existing lobby, and \$207,000 for lost goodwill. He arbitrarily assumed that goodwill in the before condition was 10 percent of total income, and assumed that all goodwill would be lost after the taking. He reasoned that no buyer would pay for goodwill because of uncertainty created by the project. He could not explain his reason for assuming that 10 percent of pre-taking income was goodwill, except that it was his rule of thumb. He conceded that his goodwill value represented the difference between his two severance calculations. Appellants have not satisfied their burden of proving entitlement to goodwill damages, and the court properly withheld from the jury testimony on the amount of lost goodwill.

C. Reference to Costco and Fairness to Public

The trial court did not abuse its discretion when it granted the City's motion in limine to preclude reference to Costco pursuant to Evidence Code section 352. The

court had already decided the right to take issue in the bench trial, where it determined the taking was for a public use. The only issue in the jury trial was the amount of compensation that was just. The court reasonably concluded that the probative value of Costco's role, if any, was outweighed by the risk of confusion and undue consumption of time.

The trial court properly instructed the jury that just compensation is an amount that is fair to the owner and fair "to the public, which must pay the compensation." The instruction accurately states the law. (*Los Angeles County Metropolitan Transportation Authority v. Continental Development, supra*, 16 Cal.4th at p. 716.) Although Costco was required to advance the City's acquisition costs, there was substantial evidence that the City is obligated to reimburse Costco beyond Costco's fair share with TIF funds collected in the specially assessed area.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.
(§ 1268.720.)

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Barry T. LaBarbera, Judge
Superior Court County of San Luis Obispo

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